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APPENDIX

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Supreme Court of the United States

October Term, 1962

No. [redacted] 37

CIVIL

GENE DURFEE and LAURA DURFEE,

Petitioners,

vs.

JULIA E. DUKE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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APPENDIX

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 16,763

Julia E. Duke,
Appellant,
vs.
Gene Durfee and Laura Durfee,
Appellees.

Appeal from the United States District Court for the Western District of Missouri.

No. 16,764

Gene Durfee and Laura Durfee,
Appellants,
vs.
Julia E. Duke,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[September 18, 1902.]

Before VOGEL, BLACKMUN and RIDGE, Circuit Judges.

BLACKMUN, Circuit Judge.

This action is another chapter in a controversy over several hundred acres of land, once an island, in the Missouri River bottoms a short distance east and south of Rulo, Nebraska, and west and south of Fortesque, Mis-

souri. It comes to us by way of appeals from a judgment dismissing the plaintiff's petition and the defendants' cross-complaint.

The basic factual situation is not untypical of these riverland title controversies yet the case admittedly presents not only simple and rather classical facts but issues which appear to possess some first impression aspects in the areas of conflict of laws and res judicata.

The middle of the main channel of the Missouri River forms the boundary between Nebraska and Missouri. Nebraska Enabling Act of April 19, 1864, 13 Stat. 47, § 2. Missouri Enabling Act of March 6, 1820, 3 Stat. 545, § 2, and the Missouri Constitution of 1820, Article I, as amended in 1834 by the Missouri Eighth General Assembly, and as affected by the Congressional Act of June 7, 1836, known as "The Platte Purchase", 5 Stat. 34, and the activating Presidential Proclamation of March 28, 1837. See *St. Joseph & G. I. R. R. v. Devereux*, C.C., D. Kansas, 1889, 41 F. 14, 15, and *Cooley v. Golden*, 1893, 52 Mo. App. 229, 232-3.

Near the land in question the river flows generally from west to east. At the present time the land lies on the north and east side of the river. However, prior to 1855, as disclosed by a survey of that year, the river's main channel was to the north and east of the land so that, if the channel still lay in that direction by 1867 when Nebraska was admitted to the Union, it was then clearly within the State of Nebraska. Patents covering the land were issued by the General Land Office of the United States in 1860 and filed some years later with the Register of Deeds of Richardson County, Nebraska.

The plaintiff, Julia E. Duke, a citizen of Missouri, claims title to the land through a Holt County, Missouri, swamp land patent issued to her in 1946 pursuant to V.A.M.S. § 241.220. The defendants, Gene Durfee and Laura, his wife, citizens of Nebraska, claim title to the land under a Richardson County, Nebraska, sheriff's tax foreclosure sale deed isued to them in 1956 pursuant to R.R.S. Nebraska 1943, § 77-1913. Julia asserts that the land is Missouri land and is thus hers by the Missouri patent. The Durfees assert that the land is Nebraska land and is thus theirs by the Nebraska sheriff's deed.

In 1956 the Durfees instituted an action to quiet title. This suit was brought in the District Court of Richardson County, Nebraska. Julia and her tenants were named as defendants. They appeared in the litigation. They filed an answer which, in addition to a general denial, contained an admission of possession, a claim of ownership, and an allegation that the land was in Missouri and not within the jurisdiction of the Nebraska court. Julia also testified in that proceeding. The Nebraska court found that it had jurisdiction of both the parties and the subject matter and that the land was in Nebraska, and quieted title in the Durfees as its owners. Julia and her tenants appealed to the Supreme Court of Nebraska. Inasmuch as the matter sounded in equity, that court tried the case de novo. R.R.S. Nebraska 1943, § 25-1925: *Dartmouth College v. Rose*, 1961, 172 Neb. 764, 112 N.W. 2d 256, 265; *Heider v. Kautz*, 1957, 165 Neb. 649, 87 N.W. 2d 226, 228. It affirmed the judgment for the Durfees. *Durfee v. Keiffer*, 1959, 168 Neb. 272, 95 N.W. 2d 618. There was no attempt to bring the case to the Supreme Court of the United States.

In 1959 Julia instituted the present title action in the Circuit Court of Holt County, Missouri. Service on the Durfees was effected by mail pursuant to V. A. M. S. § 506.160. The Durfees removed the suit to federal court. Their answer contained a general denial and asserted, as an affirmative defense, that the Nebraska proceedings were res judicata. The Durfees also filed a cross complaint alleging trespess and the harvesting of crops upon the land and seeking damages and an injunction. A petition of the State of Missouri to appear as amicus curiae was granted.

At the trial to the court the Nebraska record was introduced along with other evidence. The court wrote a memorandum in which it reviewed the applicable real property law. It concluded, contrary to the Nebraska result, that the land was in Missouri. It did so on the theory that the main channel of the river had worked its way by accretion to the south and west; that it was off to the south and west prior to the formation of the island and land in question; and that, by the time Julia acquired her Missouri patent, the land was in that state. Despite this conclusion the district court "with much reluctance" dismissed Julia's complaint on the ground that the matter was res judicata because of the earlier resolution of the identical question by the Nebraska courts. It also dismissed the cross complaint because it felt that it must fall with the main action.

The Durfee position here is that the issue before us is simply res judicata. The Durfees claim that the Nebraska litigation in which Julia actively participated involved the same parties, the same subject matter, essentially the

same evidence, and the same question for determination; that the jurisdiction issue was concededly litigated there and was decided adversely to Julia; and that the principle of res judicata applies to a jurisdictional determination as well as to a non-jurisdictional one. They also point out that everyone agrees that the land was originally in Nebraska and they urge that Julia has not sustained the burden, which is hers, of showing the shifting of the Missouri River center channel, and hence the state line, to the south and west by accretion. They claim finally that their cross complaint stands on its own feet and does not fall with the main action. There is a suggestion that the Nebraska judgment is entitled to the protection and benefit of the full faith and credit clause of Article IV, § 1, of the Constitution.

Julia takes the position that the Nebraska court did not have jurisdiction of the land as subject-matter; that, even though she appeared in the Nebraska proceedings and raised and litigated the question of jurisdiction, she is not bound by the decision of the courts of that state; that, inasmuch as it is subject-matter jurisdiction, and not jurisdiction of the person, which is here involved, the Nebraska judgment is open to collateral inquiry; that in the federal trial new additional evidence was presented; and that the federal district court, having found that the land was Missouri land, must quiet its title in Julia.

It is to be noted at the outset that this case at least appears to present a conflict between two established legal principles. The first is that

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that

matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause." *Baldwin v. Iowa State Traveling Men's Association*, 1931, 283 U. S. 522, 525-6.

The second is that

> "* * * every State possesses exclusive jurisdiction and sovereignty over * * * property within its territory. * * * The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over * * * property without its territory. * * * 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity, and incapable of binding such * * * property in any other tribunals.' Story, Confl. Laws, sect. 539." *Pennoyer v. Neff*, 1877, 95 U. S. 714, 722-3,

and that jurisdiction over real estate outside a state's boundary cannot be conferred upon a court of the state by consent of the parties.

We first dispose of the full faith and credit suggestion. Under this constitutional clause and the implementing statute, 28 U.S.C. § 1738, each state must accord to a judgment rendered in a sister state the conclusiveness that judgment enjoys in the state of rendition. This has been described by the Supreme Court as a rule of evidence, *Wisconsin v. Pelican Ins. Co.*, 1888, 127 U. S. 265, 291-2, and as one making "* * * the local doctrines of *res judicata*, speaking generally, become a part of national jurisprudence * * *". *Riley v. New York Trust Co.*, 1942, 315 U. S. 343, 349. It is clearly established, however, that the

full faith and credit clause, while foreclosing repetitious litigation of non-jurisdictional matters, does not preclude a second forum's inquiry into questions of the first court's personal or subject-matter jurisdiction. This was the holding of several early Supreme Court cases. The principle was comprehensively restated in the usually cited case of *Thompson v. Whitman*, 1874, 85 U. S. (18 Wall.) 457, 469, and has been perpetuated by later cases including *Grover & Baker Sewing Machine Co. v. Radcliffe*, 1890, 137 U. S. 287; *Adam v. Saenger*, 1938, 303 U. S. 59; *Milliken v. Meyer*, 1940, 311 U. S. 457; and *Western Union Telegraph Co. v. Pennsylvania*, 1961, 368 U. S. 71, 75. Thus, there is no full faith and credit requirement that, in the case before us, a Missouri court—and thereby the federal district court in Missouri, see *Angel v. Bullington*, 1947, 330 U. S. 183, 186-7—must accept the Nebraska judgment as final. The district court here did not violate this principle for it based its decision, not on full faith and credit, but upon res judicata.

The question of the conclusiveness of a jurisdictional determination under the res judicata principle is much more complex than the corresponding problem raised by the full faith and credit issue. To begin with, matters of personal jurisdiction and those of subject-matter jurisdiction have not received identical treatment. Thus, as to the former, where a defendant appears in the first action and litigates the question of the court's jurisdiction over his person, the ensuing judgment is held to be res judicata and not subject to collateral attack in another forum. *Chicago Life Ins. Co. v. Cherry*, 1917, 244 U. S. 25; *Baldwin v. Iowa State Traveling Men's Association*, supra, pp. 524-5 of 283 U. S. (special appearance); *American Surety*

Co. v. Baldwin, 1932, 287 U. S. 156 (general appearance); Restatement of the Law of Judgments, § 9; Restatement of the Law of Conflict of Laws (1948 Supp.) § 451(1).[1]

On the other hand, the answer, under the decided cases, to the parallel problem of conclusiveness of a prior determination of subject-matter jurisdiction, as distinguished from jurisdiction over the person, is not nearly so clear. The Supreme Court at different times has stated that the res judicata principle is both (a) applicable to determinations of subject-matter jurisdiction and (b) does not preclude a collateral inquiry into a court's assumption of subject-matter jurisdiction. The court's holdings disclose the same apparent inconsistency and are further clouded by generalizations going both ways. As a result the formulation of a governing rule is difficult. In order to ascertain the present status of the law we indulge in a chronological review of the Supreme Court cases:

(a) The earliest opinions of the court—concerned primarily with the disposition of real property—held or stated that the element of subject-matter jurisdiction, essential to a court's competency or power, could be inquired into collaterally. *Elliott v. Peirsol's Lessees*, 1828, 26 U. S. (1 Pet.) 328, 340-1; *Wilcox v. Jackson*, 1839, 38 U. S. (13 Pet.) 498, 511; *Hickey's Lessee v. Stewart*, 1845, 44 U. S. (3 How.) 750, 762-3; *Williamson v. Berry*, 1850, 49 U. S. (8 How.) 495, 540-3; *Boswell's Lessee v. Otis*, 1850, 50 U. S. (9 How.) 336. The inquiry was clearly lim-

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1 The result is otherwise where the judgment in the first action is obtained by default and without litigation of the issue of personal jurisdiction. Then collateral inquiry may be made as to the first court's jurisdiction of the person of the defendant. Baldwin v. Iowa State Traveling Men's Association, supra, p. 525 of 283 U. S.

ited to the jurisdictional question. *Thompson v. Tolmie*, 1829, 27 U. S. (2 Pet.) 157, 169; *Voorhees v. Jackson*, 1836, 35 U. S. (10 Pet.) 449, 478. This approach, by way of exception to the res judicata concept, continued apparently unquestioned until almost the end of the nineteenth century. Thus, by way of dictum, the court said in *Noble v. Union River Logging R. R.*, 1893, 147 U. S. 165, 173:

> "It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as * * * the seizure and possession of the *res* within the bailiwick in a proceeding *in rem* * * *. In these and similar cases the action of the court * * * fails for want of jurisdiction over the person or subject-matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding."

(b) Then the case of *Forsyth v. Hammond*, 1897, 166 U. S. 506, was decided. There, although the facts were not multi-state, the Court refers to the res judicata principle in the broadest terms. The city sought to annex the plaintiff's property which adjoined the city but was outside its limits. The plaintiff unsuccessfully appealed the trial court's approval of the annexation to the state supreme court. She then instituted a federal court injunction action. The Supreme Court held that the matter was res judicata and said, pp. 517-8 of 166 U. S.:

> "But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the Supreme Court of the State to have the claim established. She invoked the jurisdiction of that court. She * * * there challenged the decree of the Circuit Court, challenged it for error and also for lack of jurisdiction. The questions both

> of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the Supreme Court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of *res judicata* apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? . . . [A] decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions."

The court went on to emphasize what it called "another aspect of this case", namely, that the controversy was one peculiarly within the domain of state control, that federal court jurisdiction rested only on adverse citizenship and not on any federal constitutional right and that there was nothing in the Constitution to prevent the people of a state from giving to the courts and taking away from the legislature matters concerning the territorial boundaries of a municipal corporation.

(c) Next were two cases in which collateral inquiry was permitted. In one the attack was successful; in the other it was not.

The first was *Vallely v. Northern Fire & Marine Ins. Co.*, 1920, 254 U. S. 348. There a bankruptcy court had entertained an involuntary petition against the insurance company despite the fact that the Bankruptcy Act expressly excepted insurance corporations. After the time to appeal had expired the company moved to vacate the adjudication for lack of jurisdiction. The motion was sus-

tained by the trial court. The Supreme Court, on certificate, approved, saying, pp. 355-6:

> "The effect of these provisions is that there is no statute of bankruptcy as to the excepted corporations, and necessarily there is no power in the District Court to include them. In other words, the policy of the law is to leave the relation and remedies of 'municipal, railroad, insurance, or banking' corporations to their creditors and their creditors to them, to other provisions of law. It is easy to see in what disorder a different policy would result."

Policy was thus emphasized.[2]

The second case was *Grubb v. Public Utilities Comm'n*, 1930, 281 U. S. 470. Here the State Commission had denied an applicant an operating certificate for his buses and on his appeal, with others, the highest state court had affirmed. The applicant then pursued an injunction suit he had instituted in federal court. The Commission pleaded the state judgment as a bar. Although the appeal was decided against the applicant, the Supreme Court clearly held that the question of the Commission's subject-matter jurisdiction could be raised in the collateral proceeding, saying, p. 475:

> "That the state court had jurisdiction of the parties is plain and not questioned. But the appellant does question that it had jurisdiction of the subject matter — and this although at the outset he treated that jurisdiction as subsisting and invoked its exercise. Of course, he is entitled to raise this question notwithstanding his prior inconsistent attitude, for jurisdiction of the subject matter must arise by law and not by mere consent."

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2 See also Kalb v. Feuerstein, 1940, 308 U. S. 433, 438, 440.

The difficulty of synthesizing a rule from the decided cases at that time in the law's development was intimated by the Supreme Court itself in *Vallely* when it said, by way of comment upon the opposing arguments (i) that any litigated issue should be open only to direct attack and (ii) that courts may not act beyond the power and authority conferred upon them, p. 354 of 254 U. S.:

> "Which of the propositions shall prevail in a given case cannot be dogmatically asserted, and cases of their consideration and application can be cited against each other."

Thus, although by that time it was clear that prior determinations of subject-matter jurisdiction were sometimes open to collateral inquiry, it remained unclear as to when such an inquiry would be entertained or as to what considerations would control that decision. This uncertainty was noted in the 1934 original edition of the Restatement of the Law of Conflict of Laws. After stating the rule, in § 451, that a party appearing in a proceeding will be precluded from questioning the jurisdiction of the court over his person in any subsequent proceedings in that or any other state if the court in which he appeared purported to render a judgment against him, the American Law Institute by appended caveat[3] expressly withheld comment as to subject-matter jurisdiction. Subsequent Supreme Court cases, however, decided within the following seven years, provided additional guide lines.

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3 "The Institute expresses no opinion whether and how far a party appearing and participating in the proceedings in a court of any state is precluded from subsequently questioning the jurisdiction of the court over the subject matter of the action in the courts of that state or any other state if the court in which he appeared purported to render a judgment against him."

(d) Next was the divorce case of *Davis v. Davis*, 1938, 305 U. S. 32. The husband sought a divorce in Virginia. His wife appeared there specially to contest Virginia's jurisdiction on the ground that their marriage domicile was in the District of Columbia. The Virginia court held that it had jurisdiction of the subject-matter because, under Virginia law, the husband had established his residence in Virginia for the required length of time. The divorce was granted. The husband then sought enforcement of this decree in the District. The wife defended on the ground that the Virginia court lacked jurisdiction. The Supreme Court held that her voluntary appearance and litigation in Virginia precluded the collateral attack. The court, in support of its conclusion, cited only *Baldwin v. Iowa State Traveling Men's Association*, supra, 283 U. S. 522, which had to do with jurisdiction of the person. The Davis result is consistently adhered to by the Supreme Court in divorce cases and the challenges therein to subject-matter jurisdiction. See, for example, *Cook v. Cook*, 1951, 342 U. S. 126, and cases cited.

(e) Then followed, within eighteen months, three non-divorce cases and a supporting dictum in a fourth case to the effect that res judicata was applicable, under the facts of those cases, to the issue of subject-matter jurisdiction. The first was *Stoll v. Gottlieb*, 1938, 305 U. S. 165, decided two weeks after *Davis*. There, in a bankruptcy situation, the Court said, pp. 171-3:

> "Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration. Every court in render-

ing a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. • • •

"• • • After a party has his day in court, with opportunity to present his evidence and his view of the law; a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

"That a former judgment in a state court is conclusive between the parties and their privies in a federal court when entered upon an actually contested issue as to the jurisdiction of the court over the subject matter of the litigation, has been determined by this Court in *Forsyth v. Hammond.*" (footnotes omitted).

It sought to distinguish, pp. 175-6, but did not overrule its earlier and seemingly contrary result in *Vallely*, also a bankruptcy case, not on the basis of the actual holding in *Vallely*—that the lack of jurisdiction of the subject-matter was clear and indisputable and that failure to recognize this would be violative of a paramount congressional policy—but on a ground not relied upon in *Vallely* itself, namely, that the jurisdictional question actually had not been litigated there and judgment was obtained by default.

The second was *Treinies v. Sunshine Mining Co.*, 1939, 308 U. S. 66. There an Idaho court had determined that an award of corporate shares by a Washington court, sitting in probate but resting its decision upon an alleged post-distribution settlement between beneficiaries, was void for lack of subject-matter jurisdiction. In the corporation's subsequent interpleader action in a federal forum

the Supreme Court said, p. 78, perhaps with some inconsistency of statement:

> "The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question. Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court.
>
> "One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties." (footnotes omitted).

The third was *Chicot County Drainage Dist. v. Baxter State Bank*, 1940, 308 U. S. 371. Here the court held that the opportunity in the prior proceeding to raise the question of jurisdiction, although unavailed of, was sufficient to invoke the defense of res judicata. It said, p. 377, that a court "has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is *res judicata* in a collateral action."

The dictum to the same general effect is in *Sunshine Anthracite Coal Co. v. Adkins*, 1940, 310 U. S. 381, 403.

These cases thus seem to emphasize the actual litigation, or the opportunity for litigation, of the question of subject-matter jurisdiction in the first forum. None of them involved real estate.

(f) Also in 1940, however, came the case of *United States v. United States Fidelity & Guaranty Co.*, 309 U. S. 506. Here the policy factor, originally given weight in *Vallely*, again appears. The government, on behalf of Indian Nations, had filed a claim in a receivership in Mis-

souri. The court there had entertained the debtor's cross-claim and, in the ensuing reorganization proceedings, rendered judgment on it despite the fact the government was immune from suit without its consent. No review of this judgment was sought. The government then asserted its claim in another federal court against the debtor's surety. The Supreme Court, by Mr. Justice Reed who had also written the opinions in *Gottlieb* and *Treinies*, this time refused to regard the judgment in the reorganization proceedings as a bar and said, pp. 512-4:

> "No statutory authority granted jurisdiction to the Missouri Court to adjudicate a cross-claim against the United States. The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization. * * * The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity. * * * [T] his immunity cannot be waived by officials. * * *
>
> "The reasons for the conclusion that this immunity may not be waived govern likewise the question of res judicata. As no appeal was taken from this Missouri judgment, it is subject to collateral attack only if void. * * * Consent alone gives jurisdiction to adjudge against a sovereign. * * * Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body." (footnotes omitted).

It is thus apparent that there are situations where the policy underlying nonrecognition of jurisdiction of the court whose judgment is under attack will override application of the res judicata principle. See *United*

States v. Eastport Steamship Corp., 2 Cir., 1958, 255 F. 2d 795, 803-4.

(g) The final Supreme Court case, *Jackson v. Irving Trust Co.*, 1941, 311 U. S. 494, evidently gave the court no concern as to considerations of overriding policy. An action had been brought against the Alien Property Custodian. One of the defenses raised suggested that the claimants were "enemies" within the meaning of the governing act and were precluded from recovery. This issue was decided against the government. No appeal was taken. Some years later the government moved to set aside the earlier decree on the ground of lack of jurisdiction. The Supreme Court held that the prior adjudication precluded further inquiry, rejected an argument resting on governmental immunity, and said, p. 503:

> "[W]hen the dismissal of the suit was asked by counsel for the Government on the ground that Sielcken was an enemy under the Act, the issues thus raised were the same as those which pertained to the so-called 'jurisdictional' question of right to sue * * *. However the issues were labeled the court was authorized to determine them. * * * If the District Court had erred in dealing, or in failing to deal, with any issue thus involved, the remedy was by appeal and no appeal was taken."[4]

To be able to extract from this series of cases a short and simple governing rule is perhaps too much to expect.

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4 Lower court opinions on the subject over the years are numerous. Most of these repeat general rules and, in view of the Supreme Court cases which have been cited, we make no attempt to analyze them. Illustrative Eighth Circuit cases are Feltz v. St. Louis & S. F. Ry., 1894, 60 F. 316; Hartford Life Ins. Co. v. Johnson, 1920, 268 F. 30; Walling v. Miller, 1943, 138 F. 2d 629; cert. den. 321 U. S. 784; and Mitchell v. Village Creek Drainage Dist., 1946, 158 F. 2d 475. Compare Krone v. Lacy, 8 Cir., 1962, ___ F. 2d ___.

Our own analysis of these cases coincides with the comprehensive, although complex, statement propounded by the American Law Institute subsequent to the appearance of its 1934 caveat, footnote 3, supra, and in replacement of that caveat. This statement was developed and presented by the Institute in its 1942 Restatement of the Law of Judgments and in the 1948 revision of § 451 of its Conflicts Restatement. After leaving unchanged its position with respect to a prior adjudication of jurisdiction over the person (that such a determination is not open to collateral inquiry where the defendant had appeared to object to the jurisdiction), § 9 of the Judgments Restatement and § 451(1) of the Conflicts Restatement, it is said, § 10 and § 451(2), respectively:

> "Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyound its jurisdiction. Among the factors appropriate to be considered in determining that collateral attack should be permitted are that
>
> (a) the lack of jurisdiction over the subject matter was clear;
>
> (b) the determination as to jurisdiction depended upon a question of law rather than of fact;
>
> (c) the court was one of limited and not of general jurisdiction;
>
> (d) the question of jurisdiction was not actually litigated;
>
> (e) the policy against the court's acting beyond its jurisdiction is strong."

The Judgments Restatement contains comments interspersed with illustrations obviously based upon the Supreme Court cases cited above and the Conflicts Restatement revision makes specific reference to *Davis*, *Gottlieb* and *Treinies*.

We regard this as a correct statement of the law as the Supreme Court has developed it. We must then apply it to the facts presently before us.

We have a situation where land is in issue and where that land lies either in Nebraska or in Missouri. The determination of that question on the merits obviously coincides with the determination of the question of jurisdiction itself. The two courts involved are those of the adjoining states in one of which the land must lie. The Nebraska courts decided in favor of Nebraska. The Missouri federal court says it would have decided in favor of Missouri had it not felt itself bound by res judicata. With land at issue, we seem to have a factual situation of first impression.[5]

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5 Fifty years ago the identical jurisdictional issue was raised in this court. Whiteside v. Norton, 8 Cir., 1913, 205 F. 5, cert. den. 232 U. S. 726, appeal dismissed 239 U. S. 144. The issue there concerned title to a small island which had formed in the St. Louis River where that river constitutes the boundary between Minnesota and Wisconsin. The defendant claimed that the federal circuit court for the district of Minnesota "was without jurisdiction, for the reason that the land in controversy is in the state and district of Wisconsin, and therefore beyond the jurisdiction of the federal court sitting in Minnesota." This court decided the controversy on the merits and said, p. 13:

"It is also urged that * * * because this is an action in rem, and the land in the state of Wisconsin, the Minnesota court is without jurisdiction for that reason. These contentions raise questions of serious moment: but in view of the conclusions reached upon the merits of the controversy, it is deemed unnecessary to extend this discussion further."

This court therefore came right up to the issue presently before us but was able to avoid deciding it.

It is immediately evident that none of the first four factors mentioned by the Restatements as among those appropriate for consideration on the question of collateral attack are present here: The Nebraska courts' lack of jurisdiction is not particularly clear. The dispute is almost entirely one of fact rather than of law.[6] The Nebraska courts were certainly courts of general jurisdiction. And the jurisdictional question was fully litigated.[7] This leaves among the stated factors only the fifth one resting on policy. Is there, then, a strong policy in this kind of case against a court's acting beyond its jurisdiction?

We could take the position that where four of the five stated factors are absent and where we are concerned with decisions of courts of primary jurisdiction of only those states where the land could possibly be located, and where the jurisdictional inquiry necessarily coincides with the merits, the principle of res judicata should prevail. This would amount to a recognition, as the Supreme Court observed in *Gottlieb*, supra, p. 172 of 305 U. S., that "There is no reason to expect the second decision will be more satisfactory than the first." There would be little legal illogic in such a holding and it would parallel the situation as to jurisdiction over the person.

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6 The parties are not in disagreement as to the law concerning the effect of accretion and avulsion upon mid-channel state boundaries. See Nebraska v. Iowa, 1892, 143 U. S. 359, 370.

7 The Durfees place particular emphasis upon the fact that the issue of subject-matter jurisdiction was litigated in the Nebraska proceeding. This fact, although often relied upon, is not necessarily determinative. It is only one of the several factors appropriate for consideration under the Restatement rule. See Judgments Restatement, § 10, comment c.

We must recognize, however, that considerations of policy are present and at play in the situation before us and that it is policy which constitutes the fifth factor. We are here concerned with judicial disposition of real estate and we are here confronted with the traditional policy of immunity of a state's real property from direct disposition by a sister state's judgment.

There are Supreme Court expressions suggesting the existence of a real estate policy of this kind:

1. The earlier Supreme Court cases which refused to apply the principle of res judicata in problems of subject-matter jurisdiction and which permitted collateral inquiry were primarily real property cases. Many of these have been cited above.

2. The later Supreme Court cases which apply the barrier of res judicata do not concern real estate and strongly indicate that they were not intended to control real property situations. Thus in the bankruptcy case of *Stoll v. Gottlieb*, supra, the Court said, p. 176 of 305 U. S.:

> "To appraise the cases dealing with status and transfer of title to real estate seems outside the scope of the present inquiry. The rule applied here may or may not be applicable in instances where the courts with jurisdiction of the later controversy are passing upon matters of status and real estate titles."

A comparable reservation appears in *United States v. United States Fidelity & Guaranty Co.*, supra, where the Court, in speaking of its holding in *Chicot*, and seemingly limiting it, said, p. 514 of 309 U. S.:

> "In the *Chicot County* case no inflexible rule as to collateral objection in general to judgments was de-

> cleared. We explicitly limited our examination • • •. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status, extra-territorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts." (footnotes omitted).

Compare the language in *McCormick v. Sullivant*, 1825, 23 U. S. (10 Wheat.) 192, 202.

3. Certain of the cases which hold that the full faith and credit clause does not preclude collateral inquiry into subject-matter jurisdiction reveal particular fervor with respect to extra-territorial in rem judgments of state courts. See *Carpenter v. Strange*, 1891, 141 U. S. 87, 105-106; *Fall v. Eastin*, 1909, 215 U. S. 1; *Olmsted v. Olmsted*, 1910, 216 U. S. 386; *Hood v. McGehee*, 1915, 237 U. S. 611; *Grover & Baker Sewing Machine Co. v. Radcliffe*, supra, p. 296 of 137 U. S.; *Williams v. North Carolina*, 1942, 317 U. S. 287, 294, footnote 5; and *Milwaukee County v. M. E. White Co.*, 1935, 296 U. S. 268, 273-4.

4. Several Supreme Court dicta are significant although they were pronounced under wholly distinguishable circumstances. In *Pennoyer v. Neff*, supra, p. 720 of 95 U. S., the Court said:

> "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by his court, an illegitimate assumption of power, and be resisted as mere abuse."

In *Huntington v. Attrill*, 1892, 146 U. S. 657, 669, it was said:

> "Proceedings *in rem* to determine the title to land must necessarily be brought in the State within whose borders the land is situated, and whose courts and officers alone can put the party in possession."

See also the quotation, supra, from *Noble v. Union River Logging R. R.*, p. 173 of 147 U. S.

5. Any apparent out-of-jointedness of the older case of *Forsyth v. Hammond*, supra, can be explained by the absence there of a multi-state conflict and by the natural hesitation of the Court to intrude upon what it felt was a matter involving construction by state courts of a state's constitution and statutes. See pp. 518-9 of 166 U. S.

We are aware that a state itself is evidently not bound by res judicata by the results of litigation between private parties which has an indirect bearing upon the state's interest but to which the state was not a party. *United States v. Lee*, 1882, 106 U. S. 196; *Land v. Dollar*, 1947, 330 U. S. 731, 736-7. Nevertheless, we are inclined to feel that the courts of a state which is directly and adversely affected by the first forum's determination in its state's favor of the situs of land as between the two states should be able properly to inquire into the jurisdictional grounds of the first holding and should not be prevented from so doing by an immovable concept of res judicata. Of course, boundary matters, where directly contested between states themselves, fall within the original jurisdiction of the Supreme Court by Article III, § 2, of the Constitution. See *Missouri v. Nebraska*, 1904, 196 U. S. 23. But a state's sovereignty, the validity of its own land titles and its power to tax, can be affected, although indirectly, by proceedings of the very kind which have taken place here. It seems not unreasonable or improper,

therefore, as a matter of policy where land is concerned, to allow a court of the affected state the opportunity to satisfy itself as to the first forum's subject-matter jurisdiction. Permitting collateral attack does not mean that the attack is always successful. See *Grubb v. Public Utilities Comm'n.*, supra, 281 U. S. 470. Compare *Moore v. Rone*, Mo. App., 1962, 355 S. W. 2d 398.

After careful consideration we conclude that, for a land case such as this, a policy of careful recognition of jurisdictional limitations and of permitting inquiry into the basis of subject-matter jurisdiction outweighs any conflicting res judicata principle. We feel that as a matter of basic legal philosophy the question of excessive judicial action by way of claimed jurisdiction over land presents a fundamental and classic situation where validity may be a proper subject of inquiry despite opposing considerations in favor of the termination of litigation. We therefore hold that the United States District Court for the Western District of Missouri in this case had the power to make collateral inquiry as to the jurisdictional basis of the Nebraska judgment.

As we have noted, the trial court in its findings and memorandum, clearly indicated that it was its conclusion on the merits that the land was Missouri land at the time Julia Duke received her swamp land deed. Although we feel that this conclusion finds ample support in the record, we deem it advisable, rather than to reverse with specific directions, to return the entire case to the district court so that it may take such further action on the merits of the main suit and on the cross-complaint as it feels is now indicated by the results we have reached here. Of

course, if Julia prevails in the main action, the cross-complaint for an accounting and an injunction will necessarily be decided adversely to the Durfees.

The judgment below is therefore reversed and the case is remanded for further proceedings consistent with the views herein expressed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

September Term, 1962

Julia E. Duke, *Appellant,* No. 16,763. vs. Gene Durfee and Laura Durfee, husband and wife.	Appeal from the United States District Court for the Western District of Missouri.

and

Gene Durfee and Laura Durfee, *Appellants,* No. 16,764. vs. Julia E. Duke.	Appeal from the United States District Court for the Western District of Missouri.

These Causes came on to be heard on the original files of the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in these causes be, and the same is hereby, reversed.

And it is further Ordered by this Court that these cases be, and the same are hereby, remanded to the said District Court for further proceedings consistent with the views expressed in the opinion of this Court this day filed herein.

September 18th, 1962.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

September Term, 1962.

No. 16763 Julia E. Duke, *Appellant,* vs. Gene Durfee and Laura Durfee, husband and wife.	Appeal from the United States District Court for the Western District of Missouri.
No. 16764 Gene Durfee and Laura Durfee, husband and wife, *Appellants,* vs. Julia E. Duke.	Appeal from the United States District Court for the Western District of Missouri.

There is before the Court petition of Gene Durfee and Laura Durfee, husband and wife, for rehearing en banc and on consideration of such petition, it is the order of the Court that the petition for rehearing en banc be, and it is hereby, denied.

It is further ordered that the petition for rehearing be, and it is hereby, denied.

October 11, 1962

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI ST. JOSEPH DIVISION

JULIA E. DUKE,

Plaintiff,

vs.

GENE DURFEE and LAURA DURFEE, husband and wife, et al.,

Defendants.

No. 1027

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Plaintiff, a resident of Missouri, instituted this suit against the defendants in the Circuit Court of Holt County, Missouri, on May 23, 1959, alleging that she is the owner in fee simple and in possession of the real estate described in the "Petition". (The land described by metes and bounds is quite long and consists of several hundred acres of an island in the Missouri River Bottoms, and in view of the court's determination of the case, I see no reason to set out the description here.)

The case was removed to this court by the defendants, Gene and Laura Durfee, residents of the State of Nebraska. This court has jurisdiction by virtue of non-residency of said defendants and the amount in controversy, which exceeds the sum of $10,000.00.

Plaintiff alleged that the defendants Durfee claim some right, title or interest in and to said real estate, and

that the defendants Ralph Keiffer and Russell Nauman are in possession of the property as tenants of the plaintiff; that the defendant, First State Bank of Forest City, Missouri, is the beneficiary, and defendant James H. Pettijohn is the trustee of a deed of trust, and that such parties have no interest in the litigation other than that set out herein.

Plaintiff asks the court to decree that the fee simple title is in her and that the defendants be forever enjoined and restrained from asserting or claiming any right, title or interest in or to any of said property.

Plaintiff claims ownership by virtue of a Swamp Land Patent issued to her by the State of Missouri (Holt County) under the provisions of § 241.220 R. S. Mo. 1949, in 1946.

The evidence reveals that the defendants Durfee obtained a sheriff's deed to the property as the result of a tax forclosure sale by Richardson County, Nebraska. Plaintiff also claims title by adverse possession, which will be discussed hereafter.

The main channel of the Missouri River was established as the boundary between Missouri and Nebraska at the time Nebraska was admitted to the Union.

It is the defendants' contention that the land in controversy is on the Nebraska side of the main channel of the Missouri River, and thus the property of the State of Nebraska.

In 1956, the defendants Durfee brought an action in the District Court of Richardson County, Nebraska, against Julia E. Duke and her tenants, to quiet title, al-

leging that they were the owners by virtue of the sheriff's deed, as heretofore mentioned.

The defendants in that case raised the issue of the sufficiency of the service upon them, which was overruled by that court, and they then submitted themselves to the jurisdiction of the court and joined in the trial of the issue as to whether the land in controversy was in the State of Missouri or in the State of Nebraska.

After hearing all of the evidence, the District Court made a general finding that the land was in Nebraska; that the plaintiffs were the owners thereof, and that the defendants had no right, title or interest thereto. On appeal by the defendants to the Nebraska Supreme Court, the action of the District Court was affirmed in an opinion in 95 N. W. 2d 618.

Because the District Court had not made any Findings of Fact or Conclusions of Law, the Supreme Court tried the case de novo, made its Findings of Fact and Conclusions of Law, and also arrived at the determination that the land was in the State of Nebraska.

That court fully discussed the evidence, the maps and other exhibits as a basis for its finding. There was no appeal by the defendants from the decision of the Nebraska Supreme Court to the Supreme Court of the United States. Instead the defendant there, Julia Duke, instituted this suit in the State of Missouri.

Here, the defendants raise the question of the jurisdiction of this court to hear and determine the issues, as they were determined by the Nebraska Court, and contend that the decision in the Nebraska Court is final and is entitled to full faith and credit and is res judicata.

I concur in the finding of the Nebraska court that prior to 1855, the main channel of the Missouri River flowed to the north and east of the location of the land in question here. The survey of 1855-56 shows that the main channel of the River had moved west and south of its location prior to that time, but was still east and north of the land in question.

In 1877 a railroad bridge was built across the river above the land that is now in question. The open span of the bridge was near the right bank or the Nebraska side of the river. An extended dike was constructed on the left side or the Missouri side of the river, leading to the bridge.

It is contended, and I think it is true, that this work had the effect of shifting the main channel of the river to the west and south. It is probable that it was in this area that islands began to form and grow by accretion, and it was the islands and the land thus created that plaintiff testifies she remembers in the early '20s. At least by 1930, they had grown sufficiently that one Slagle in 1932 laid claim to them by virtue of a quit claim deed.

The Nebraska court found that at that time there was a defined channel west and south of the island. That court however, found that the main channel of the river continued its course along what is now the old chute.

Slagle built a cabin on the island, fenced part of it and apparently ran some livestock on it, and continued in possession until about 1943, and paid taxes to Richardson County, Nebraska. It was shortly after Slagle obtained possession of it (probably 1933-34) that the Gov-

ernment began its channel control work. Thereafter, as a result of this work, the channel of the river was moved to the west and south.

Apparently it was upon these facts that the Nebraska court determined that the change in the course of the river resulted from avulsion rather than from attrition or accretion.

In arriving at its conclusion, the Supreme Court of Nebraska in syllabus 7 which was written by the court, l. c. 620 of its opinion, said:

> "The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto."

At page 624 of its opinion, that court stated:

> "We are here dealing with an island that formed in the river west of the main channel of the river when it ran where the chute now is. That island grew by processes of accretion and finally by reliction. The boundary of the mainland and that of the island meet at the thread of the old chute."

Considering the court's own statement, I think it must be assumed that prior to the cutting of what is referred to as the "new chute and channel" the main channel of the river was to the west of the island formation.

I am unable to find any evidence in the case that is convincing to me that the chute was the result of the gradual change of the course of the river. To me, the most convincing evidence is that the chute which was formed in the early '20s, was the result of avulsion occa-

sioned by the accumulation of ice which suddenly cut a new channel, but I do not believe the evidence shows that this new chute or channel became the main channel of the river.

Following the course of the river from 1846 to the period prior to the cutting of the channel, I find no evidence of the formation of a new channel by avulsion, unless it was the chute referred to above. If the channel was the result of avulsion, as it is my conclusion it was, and if the main channel prior thereto was west of the formation of the island, then, of course, the property lines did not change nor did the boundary between Nebraska and Missouri change.

The question of ownership by adverse possession was not raised by the defendants in the Nebraska District Court, but was raised in the Supreme Court. That court held that it was bound to determine the case upon the same issues that were presented to the District Court, and, therefore, refused to consider the question of adverse possession.

In arriving at its conclusion, the Supreme Court of Nebraska found:

> "Prior to 1855, the main channel of the Missouri River flowed some distance to the north and east of the location of the land in question. The 1855-1856 survey shows that the main channel of the river had moved west and south, but was still east and north of the land in question. The evidence is ample that thereafter the main channel of the river for many years was along the course of the 'old chute' to which witnesses refer and to which the trial court referred in its decree.

"About 1887 a railroad bridge was built across the river a short distance above the area in question. The open span was near the right bank of the river. An extended dike led to the bridge on the left side of the river. The construction of the bridge had the effect of shifting the main channel of the river to the west and south. Sand bars and shallow water appeared to the east and north of the new channel and west and south of the former main channel. The land involved here began as an island in that area. It grew by accretion.

"At least by 1930, it was sufficiently established to be claimed by a person who quitclaimed it to a Mr. Slagle in 1932. At that time there was a defined channel west and south of the island. However, the evidence of eyewitnesses is that the main channel of the river continued its course along what is now the 'old chute'.

"Mr. Slagle had a cabin on the island, fenced parts of it and kept livestock on it, and had an employee on it at times. He continued in possession of it until 1943, and paid taxes to Richardson County, on it until 1944. In 1933 or 1934 the United States government began the work of channel control on the river. In the next few years as a result of that work the main channel of the river was moved to the west and south. As a result of silting in times of flood the island increased by accretion.

"In 1943 or 1944, defendant entered upon the island from the old left bank across the old chute, burned grass and underbrush, built a fence along the chute, and undertook to do some plowing. When the river was in high water stage, water flowed through the old channel where the chute now is located. Recurring annual floods prevented much development until 1954 or 1955 when over 200 acres of land were cleared by defendant and put to crops.

"If the river shifted by avulsion from its first position to the main channel as it was and where the

chute now is, that shift would avail defendant nothing for the boundary between the states would remain where it was before the avulsion. If, however, that moving of the channel to the west and south was by accretion, it would avail the defendant nothing for the land here involved is not accreted land to the old left bank of the river.

"We are here dealing with an island that formed in the river west of the main channel of the river when it ran where the chute now is. That island grew by processes of accretion and finally by reliction. The boundary of the mainland and that of the island meet at the thread of the old chute.

"The left bank of the river did not move west and south by accretions to the river bank. Rather, as a result of the works of man and the forces of the water, the river established a new main channel to the west and south of the island.

"The question is: Is the island in Missouri or Nebraska?

"The effect of the trial court's finding is that it is in Nebraska.

"We think it patent that we cannot apply the rule of accretion to the changed course of the stream. Rather it is a situation to which the rule of avulsion applies."

The question of res judicata was timely raised by the defendants by Motions to Dismiss in this court, and were by this court overruled before the case came on for trial.

It is plaintiff's contention that the question of jurisdiction may be raised at any time, and that the factual situation as to whether or not the land is actually in Nebraska or Missouri would determine the question of the jurisdiction of this court regardless of any Findings

of Fact or Conclusions of Law reached by the Nebraska courts in the former trial.

At the time the Motion to Dismiss was determined by the court, it was felt that the whole matter should be presented to the court so that it could make such decision as it felt necessary to a full and complete determination both of the question of jurisdiction and the question of fact.

The decisions of the state and national courts involving the title to lands along the Missouri River and islands therein, are so numerous that they fill many volumes. Such questions are always troublesome to the courts, although the principles of law involved are well settled.

Before it was subdued, the Missouri River was the greatest outlaw the West has ever known. It was as nomadic as the tribes that lived along its banks and gave it its name. It was no respecter of persons or property. It often took from those who had and gave to those who had not; it often took from the poor and gave to the well-to-do.

When we attempt to determine where the channel was from year to year prior to the period when the channel stabilization program began, we must rely upon the memory of man to a very large degree, and, of course, the memory of man is often faulty and fades with time, and no two pairs of eyes see the same thing in the same way, although they may be equally honest in their attempt to describe that which actually exists.

Islands are formed in the Missouri River during one high water period and taken away in another. They are

moved from one place to another, sometimes slowly, sometimes over night. Land and islands may be created by accretion, by avulsion or by attrition. There is no dispute about the legal principle that when the river suddenly changes its channel or its course, the property lines existing prior thereto are not affected, and that includes the boundaries between these states. If the main channel of the river changes by attrition or as the result of erosion, the boundary follows the course of the river.

It was not until the Corps of Engineers of the United States Army began the work of controlling the channel of the Missouri River for navigation purposes and later for flood control purposes, that its course had any stability. Since that time it has reasonably been confined within the areas charted by the engineers.

The history of the land in question goes back to as early as 1916, when the father of the plaintiff first acquired the land of which the land in question is now a part. Plaintiff testified that her father had acquired a part of the land in 1916 by purchase; that she remembered in the early '20s that there was land south and west of her father's land; that as a child she remembered having walked out on that land.

A portion of a cottonwood tree was introduced in evidence at the time of this case, which the plaintiff testifies was cut on the land in controversy in 1959. The state forester of Missouri testified that the tree was at least 35 years old, which indicated that the land, at least some portion of it, had existed with sufficient permanency to support the growth of shrubbery and trees for that many years. Plaintiff further testifies that her father

from time to time had livestock on a portion of the land in controversy.

Plaintiff remembers when the chute was formed in the mid-'20s. She says the river cut-through was caused by an ice gorge. She remembers her father's attempt to stabilize the bank of the river at the place where the chute cut through. She further testifies that as a result of the cutting through, approximately 100 acres of her father's land was cut away, because thereafter that amount was removed from the tax rolls in Holt County, Missouri.

To me, the evidence clearly reveals that prior to the cut-through and the formation of the chute, the main channel was to the south and west of the land in controversy.

Some time in the early '30s the Government began its work of stabilizing the Missouri River by placing revetments and whatever other types of engineering devices the particular nature and character of the work required. These dikes started on the Missouri side of the river and extended through the plaintiff's land, and plaintiff says to the main channel of the river. Thereafter there was a gradual closing of the chute.

In 1943, the plaintiff began to use a portion of the land, she caused a portion of it to be burned off and a portion of it was cultivated, but it was not until 1946 that she acquired the deed which has heretofore been described. In 1946, she bought a bulldozer and started building a crossing across the chute. From year to year thereafter plaintiff continued to put forth such effort as the season would permit, to bring additional portions of the land under cultivation.

Naturally, the extent of the high water would determine the extent she was able to carry on these activities. The nature of the season and the extent of the high water would also determine the rapidity with which the chute was filled up. Whether or not this chute was ever the main channel of the river, is, of course, the principle question in this controversy.

Assuming that prior to the cutting of the chute the main channel and the boundary line between the states were to the south and west of the land in controversy, the sudden cutting of the chute, even if it created a new main channel, would not have changed the line, because it was by avulsion and did not affect property lines.

It is a matter of common knowledge among those who have lived along the river, that islands rise from season to season, and may shift from season to season, depending upon the amount of high water, and, as one of the expert witnesses expressed it, the result of numerous "flows" or "currents" which may not constitute the main channel of the river.

The evidence revealed that there are many currents and cross-currents in the Missouri River, but not necessarily are such currents or cross-currents the main channel of the river. They do, however, materially affect the development and the building of islands and the cutting of minor chutes through an island. At one season of the year there may be a chute through an island, and at another season and after a period of high water the chute may have completely disappeared. As the island increases in size and height and vegetation begins to grow upon it, it gathers more sediment, mud and silt, thus becoming more secure and develops with much greater rapidity.

Certainly if the area which constituted the chute was the main channel and was caused to fill up gradually because of the building of the revetments by the Army Engineers, it did not suddenly change its course. Whether or not the river changes its channel gradually or suddenly as the result of the engineering efforts of men, does not affect property rights or the line between the states. If the channel of the river was caused to move slowly because of the revetments, the property lines would follow it. If it was caused to move suddenly, they would not follow it.

I have carefully reviewed the evidence that was introduced in the Nebraska court and in this court, including the two experts who have had much experience in construction work on the Missouri River, and I am convinced that the evidence clearly shows that prior to the formation of the island in controversy, the main channel of the river was to the south and west thereof.

With due respect to the learned gentlemen on the Nebraska courts for whom I have the most profound respect, I am unable to agree with them that the chute became the main channel. But, if it did become the main channel, it was by avulsion and did not affect the boundary line.

There is no contention in this case that the land formerly acquired by the plaintiff's father and now belonging to her mother, is on the Nebraska side of the river, and if that is true, it is difficult for me to understand how, under all the evidence, that the land in controversy is, or was at the time the issue was determined by that court, in Nebraska.

During a long period of time both states apparently exercised jurisdiction over the land; the prosecuting attorneys of both states exercised jurisdiction over it; the alleged Nebraska owners did not exercise any supervision or occupancy of the land from the late '30s or early '40s until this suit was brought in 1959, and plaintiff was in unquestioned, undisputed possession of the land from 1943 until the present time.

It is my definite conclusion that under all the evidence in this case, the land was located in Missouri at the time plaintiff acquired her deed under the Swamp Land Title Act. Notwithstanding my conclusion that the land is located in Missouri, I am convinced that under the law this court has no jurisdiction to determine that question, and it is with much reluctance that I must conclude that the Nebraska decision is res judicata and determinative of the whole question of location and ownership.

If the defendant had not litigated the subject of the location of the land and her right to the possession and ownership thereof in the Nebraska court, I think there would have been no question about the right of this court to hear and determine that issue, but that is not the fact. The parties submitted themselves as well as their cause to that court. The question has been before the courts both state and national many times and involving many types of situations both as to individuals and property.

There is a very significant statement in the Commentaries by Mr. Justice Story quoted in *Grover & Baker Machine Co. v. Radcliffe*, 137 U. S. l. c. 296, that:

"* * * 'no sovereignty can extend its process beyond its own territorial limits, to subject other persons or

property to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals;' * * * 'Such is the familiar, reasonable and just principle of the law of nations; and it is scarce supposable that the framers of the Constitution designed to abrogate it between States which were to remain as independent of each other, for all but national purposes, as they were before the revolution.''

Reading this quotation from the Commentaries of a great jurist in an abstract manner might lead one to say that the principle there expressed is applicable here and would confer power upon this court to again hear and determine the question for itself. But, when we read it in connection with the many decisions on the subject, it takes on a different meaning. For example, it was said in *Baldwin v. Iowa State Traveling Men's Assoc.*, 283 U. S. 522 at 525, 526:

"* * * The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. (Citations omitted.) It had also the right to appeal from the decision of the Missouri District Court, * * *. It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that

> matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

I am not unmindful of the language of the court in *Treines v. Sunshine Mining Co.*, 308 U. S. 66, in which the question of jurisdiction was extensively discussed, but I think a careful reading of that opinion clearly indicates that the question of jurisdiction was not determined in the Washington court, and that if it had been so determined, it would have been *res judicata* because the court says:

> "One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties."

All of the issues that are now before this court, except that of ownership by adverse possession, were tried by the Nebraska court, with all of the parties present contesting those issues, and while the question of jurisdiction of a *res* may be relitigated by a second court (Thompson v. Whitman, 18 Wall. 457), yet this right is limited in its application to cases where the jurisdictional point was not litigated in the first suit. *Adam v. Saenger*, 303 U. S. 62; *Berkman v. Ann Lewis Shops*, 246 F. 2d 44, 47.

Although it is my belief that the evidence clearly reveals that the land lies in Missouri, yet a trial of that very issue with all of the parties present in the Nebraska court is now binding upon this court, and precludes it from again decreeing the ownership of the land, and that

the finding and judgment must be against the plaintiff on that account only.

The defendants have filed a counterclaim asking for an accounting of the profits derived by the plaintiff as a result of use of the land. Having determined that this court is without jurisdiction to determine the question of the ownership of the property, I think this court is without jurisdiction to determine this question. However, if I were to determine the issue, I would say most definitely that the amount of money which has been expended by the plaintiff in bringing the land to a state of cultivation far exceeds the amount of profit she has derived therefrom, and that she would not be liable to the defendants for any sum.

R. M. DUNCAN, *Judge*.

Dated: January 23, 1961.

GENE DURFEE, ET. AL.,

Appellees,

vs.

RALPH KEIFFER, ET AL.,

Appellants.

95 N. W. 2d 618.

Filed March 27, 1959. No. 34523.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Affirmed*.

Pettijohn & Eiser and *Wiltse & Wiltse*, for appellants.

Ross & O'Connor and *Alfred A. Fiedler*, for appellees.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an action to quiet title to land. As originally brought it involved a claim to land lying on both sides of an old chute in the Missouri River. At the area involved the Missouri River runs generally in an east and west direction. The land lying east and north of the chute appears to have been owned by defendant Nellie N. Duke, she having a life estate, with remainder in three children. The land lying south and west of the chute was claimed by the defendant, Julia E. Duke.

Issues were made and trial was had resulting in a decree that plaintiffs were the owners of the land involved lying south and west of the middle of the chute. Defendants appeal. There is no cross-appeal by plaintiffs. Hence the appeal here involves only the lands claimed by defendant Julia E. Duke. We, then, consider it as an appeal in an action brought against defendant Julia E. Duke, hereinafter called defendant, and her tenants.

Plaintiffs alleged in their petition the ownership of the land; that they were owners under and by virtue of a deed executed and delivered as the result of a tax foreclosure proceeding in Richardson County; that the land was situated wholly in the State of Nebraska; that it was west of the meander line of the middle of the channel of the Missouri River as established by a United States government survey in 1855-1856; that the Missouri River by avulsion in 1916 changed its course to its present channel west and south of the land involved; and that the boundary between the states remained as it existed at the time of the 1855-1856 survey.

Defendants answered and alleged that the lands were wholly in the State of Missouri and not within the jurisdiction of the court. They then denied generally, admitted possession, and claimed ownership. They prayed for a dismissal of the plaintiffs' petition.

At the trial defendant testified that she based her claim of title on a swamp land patent from the State of Missouri.

On appeal here defendant argues that she proved ownership by adverse possession. Plaintiffs contend that such a claim must be affirmatively pleaded and cannot now be raised. It does not appear that such a contention was advanced to the trial court. Defendant's testimony negatives it. Claim of ownership by adverse possession is advanced here for the first time.

The rule is: This court will dispose of a case on appeal on the theory on which it was presented to the trial court by the parties. See O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123.

This cause is here for trial de novo subject to the rule that: In equity cases when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. See Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393.

Both parties here introduced a large number of aerial photographs, maps, and charts of the area where the land in dispute is located. The record is replete with

the testimony of witnesses who referred to locations of land, buildings, fences, dikes, streams, etc., by general statements of "here" and "there," and "indicated" to the trial court the reference to the location they were testifying about. In many instances we are unable to determine with any degree of certainty to what they refer, and in some instances even the exhibits mentioned cannot be identified. Trial courts should not permit a record to be made of testimony referring to exhibits without requiring counsel and witnesses to identify for the record that about which they testify. Where such a record is made we have no recourse but to apply the above equity rule, and do so here.

It is advisable at this point to state the rules of law that are to be considered here. The parties here are not in disagreement that the boundary between Missouri and Nebraska at the time of the admission of the states to the Union was the center of the channel of the Missouri River. We have held: "That boundary may and does fluctuate with the changes of the channel of that stream where the alteration is gradual and imperceptible; but, when by a sudden variation the stream seeks and marks for itself an entirely new course and abandons the old path, the boundary remains along the line which constituted the center of the old channel.'" Lienmann v. County of Sarpy, 145 Neb. 382, 16 N. W. 2d 725.

"Where the main channel of the river changes by accretion and decretion, the boundary between the two states follows the channel. * * * Where the main channel of the river changes by avulsion to a new course, the boundary does not change but becomes fixed along the

line which constituted the center of the old channel. * * * Land cuts off from the mainland of a state by avulsion do not change their status but remain a part of the state from which they were cut off." Lienmann v. County of Sarpy, *supra*.

"Land uncovered by a gradual subsidence of water is not an accretion, but a reliction. The same law applies to both these forms of addition to real estate which are held to be the property of the abutting landowner. * * * Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of the surface level from any cause. * * * Where by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner. * * * The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto. * * * Where the accretion commences with the shore of the island and afterward extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact," Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57.

"Avulsion is the sudden and rapid change in the course and channel of a boundary river. In Nebraska v. Iowa, 143 U. S. 359, 12 S. Ct. 396, it was said: 'It is

equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion.'" Conkey v. Knudsen, 143 Neb. 5, 8 N. W. 2d 538.

We here refer to the banks of the Missouri River as the left bank and as the right bank, as they appear looking downstream.

We find the following factual situation from the record.

During annual flood periods the river ran over a wide area in the location in question. At normal and low water flow it followed a fairly well defined main channel.

Prior to 1855, the main channel of the Missouri River flowed some distance to the north and east of the location of the land in question. The 1855-1856 survey shows that the main channel of the river had moved west and south, but was still east and north of the land in question. The evidence is ample that thereafter the main channel of the river for many years was along the course of the "old chute" to which witnesses refer and to which the trial court referred in its decree.

About 1887 a railroad bridge was built across the river a short distance above the area in question. The open span was near the right bank of the river. An extended dike led to the bridge on the left side of the river. The construction of the bridge had the effect of shifting

the main channel of the river to the west and south. Sand bars and shallow water appeared to the east and north of the new channel and west and south of the former main channel. The land involved here began as an island in that area. It grew by accretion.

At least by 1930, it was sufficiently established to be claimed by a person who quitclaimed it to a Mr. Slagle in 1932. At that time there was a defined channel west and south of the island. However, the evidence of eye-witnesses is that the main channel of the river continued its course along what is now the "old chute."

Mr. Slagle had a cabin on the island, fenced parts of it and kept livestock on it, and had an employee on it at times. He continued in possession of it until 1943, and paid taxes to Richardson County on it until 1944. In 1933 or 1934 the United States government began the work of channel control on the river. In the next few years as a result of that work the main channel of the river was moved to the west and south. As a result of silting in times of flood the island increased by accretion.

In 1943 or 1944, defendant entered upon the island from the old left bank across the old chute, burned grass and underbrush, built a fence along the chute, and undertook to do some plowing. When the river was in high water stage, water flowed through the old channel where the chute now is located. Recurring annual floods prevented much development until 1954 or 1955 when over 200 acres of land were cleared by defendant and put to crops.

If the river shifted by avulsion from its first position to the main channel as it was and where the chute now is, that shift would avail defendant nothing for the boun-

dary between the states would remain where it was before the avulsion. If, however, that moving of the channel to the west and south was by accretion, it would avail the defendant nothing for the land here involved is not accreted land to the old left bank of the river.

We are here dealing with an island that formed in the river west of the main channel of the river when it ran where the chute now is. That island grew by processes of accretion and finally by reliction. The boundary of the mainland and that of the island meet at the thread of the old chute.

The left bank of the river did not move west and south by accretions to the river bank. Rather, as a result of the works of man and the forces of the water, the river established a new main channel to the west and south of the island.

The question is: Is the island in Missouri or Nebraska?

The effect of the trial court's finding is that it is in Nebraska.

We think it patent that we cannot apply the rule of accretion to the changed course of the stream. Rather it is a situation to which the rule of avulsion applies.

In Whiteside v. Norton, 205 F. 5, 45 L. R. A. N. S. 112, the court was presented with a similar fact situation and held that the cutting of a new channel was analogous to avulsion.

In James v. State, 10 Ga. App. 13, 72 S. E. 600, the court had a somewhat similar problem to solve. The court

held that there was no evidence of a change "by the sudden and violent process of avulsion," yet the act of the United States government in changing the course of a river to improve navigation was analogous to a change caused by avulsion and not by accretion, and that the boundary line was not affected.

In State v. Eklund, 147 Neb. 508, 23 N. W. 2d 782, we had a quite similar set of facts and decided this precise question by applying the rule of avulsion. We quoted with approval this language from Commissioners v. United States, 270 F. 110: "'* * * where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream.'"

The above decision is controlling here. We hold that the land involved in this appeal, lying south and west of the old chute, is within the State of Nebraska; that the trial court had jurisdiction of the cause; and that defend-

ant's swamp land patent from the State of Missouri conveyed no title to her.

This decision is not to be construed as deciding in any way the jurisdictional location of the land east and north of the old chute, as that land is not involved in this action as it comes to us here.

Defendant, assuming that we might find that the land involved is in the State of Nebraska, relies on the rule that: Plaintiff in an action to quiet title has the burden of proof and he must recover upon the strength of his title and not because of any weakness in the title of his adversary. See Stratbucker v. Junge, 153 Neb. 885, 46 N. W. 2d 486. She contends that plaintiffs have not met their burden of proof.

Defendant here contends that the sheriff's deed under which plaintiffs claim title was void.

It is not claimed by defendant that there was any residence on the land where service at the usual place of residence could have been had. It is not claimed that defendant was a resident of Nebraska. In fact the evidence shows that she was a resident of Missouri. It is not claimed that there was anything of record in Richardson County that showed the defendant had or claimed any title or interest in this land.

The foreclosure action named the Slagles as defendants. It named John Doe and Mary Doe and all persons having or claiming to have any interest in any part of the described real estate. As to John Doe and Mary Doe the sheriff's return showed that they were not found in Richardson County.

Defendant's claim rests upon that part of section 25-321, R. R. S. 1943, regarding service upon unknown defendants which provides: "Judgments and decrees against persons so designated and made defendants and served by publication as herein provided shall be conclusive as against all persons who are not in actual possession of such property and whose ownership of, interest in, rights or title to, or lien upon such property does not appear of record in or by their respective names in the county wherein such property is situated."

Defendant contends that she was in "actual possession" and hence entitled to the protection of the act. Defendant makes no charge of irregularities in the proceedings other than the above.

It is to be remembered that when defendant entered upon the land in 1943 or 1944, to the limited extent shown, she entered as a trespasser. After 1946, she claimed under and by virtue of the Missouri land patent. She made no claim to a right of possession otherwise.

The petition of foreclosure was filed August 23, 1955. The sheriff made return of service on August 26, 1955. The decree was rendered on December 15, 1955. The sale was confirmed and the deed to plaintiffs issued and recorded on February 24, 1956.

The question, then, relates to defendant's claim of possession during the above period.

As to that the evidence is extremely meager. The evidence is that there were 220 acres of growing crops on the land in 1955. Defendant testifies that she was in "possession," and received no summons or notice of the

foreclosure proceedings. The nearest she comes to defining her possession is to refer to "the land I was supposed to be in the operation of."

A Mr. Keiffer testified that he started farming for defendant on this land in 1954; that "I had about 200 acres" and a good crop growing there in August 1955; and that he was not served with summons. A Mr. Nauman testified that in 1955 he "worked" for Mr. Keiffer. No one undertook to testify as to the nature of the arrangements whereby Keiffer farmed for defendant. In her brief here defendant refers to Keiffer and Nauman as "her tenants." Whether that relates to the time of the tax foreclosure action or the time the instant action was started is not certain.

Neither Keiffer nor Nauman is named as defendant in the tax foreclosure action. They are named as defendants in the instant action brought in November 1956, as parties in possession of a part of the premises. Their answer filed jointly with the Dukes admits possession and alleges ownership in the Dukes. Neither Keiffer nor Nauman is here claiming any invasion of his rights. The contention here is solely that of the defendant.

We find nothing in the record that even suggests that there was anyone resident on the land or even working on the land when this action began upon whom service of summons could be had. The sheriff's return, which imports verity, negatives any such a conclusion. There is no suggestion that anyone going to the land could have found anyone or anything there that would have suggested where inquiry could be made to determine

who, if anyone, claimed any interest in the land. In fact there is no evidence as to where the defendant or her "tenants" were during the period here involved. They make no showing that they were on the land, or in the area of the land, or were either in the State of Missouri or State of Nebraska.

The defendant's position rests solely on the fact that Mr. Keiffer farmed the land for her and that there were over 200 acres of growing crops thereon.

Does that establish "actual possession" within the contemplation of the statute? What did the Legislature intend when it used the term "actual possession"?

In Parsons v. Prudential Real Estate Co., 86 Neb. 271, 125 N. W. 521, 44 L. R. A. N. S. 666, where the tax laws required service of notice upon "every person in actual occupancy of" the lands, an attack was made on a tax deed upon the ground that one Parker was in "actual occupancy" of the premises and that no notice was served on him. Parker was a trespasser and did not live on the land, but cropped the ground. We accepted the following definition: "'Occupant' * * * 'One who occupies; an inhabitant; especially, one in actual possession, as a tenant, who has actual possession, in distinction from the landlord, who has legal or constructive possession.'" We held that Parker was not an actual occupant of the land.

That decision was filed March 10, 1910. The part of the statute here involved was enacted in 1921. See Laws 1921, c. 226, § 1, p. 815. So we had defined the term before the Legislature adopted it.

The rule is: It is to be presumed that the Legislature in using language in a statute gave to it the signifi-

cance that had been previously accorded to it by the pronouncements of this court unless a different meaning has been provided by the context of the statute. See Gomez v. State ex rel. Larez, 157 Neb. 738, 61 N. W. 2d 345.

We adhered to the above definition in Quist v. Duda, 159 Neb. 393, 67 N. W. 2d 481.

We construed Parsons v. Prudential Real Estate Co., *supra*, in Kuska v. Kubat, 147 Neb. 139, 22 N. W. 2d 484. The court said: "In that case service of notice to redeem was given to nonresidents only by publication, as in the case at bar. At that time there was a person in actual possession or occupancy of the property but he was a trespasser. No personal service of notice to redeem was had upon him. This court held that none was necessary. In construing the Constitution and applicable statute, it was held that 'occupants' and 'actual possession or occupancy' were synonymous and meant actual, open, visible possession or occupancy in fact, exactly that and nothing less, as distinguished from constructive possession. It was also held that the actual possession or occupancy must be by one claiming an interest in the property either in privity with or adversely to the owner as distinguished from a mere trespasser."

Defendant relies here on Harris v. Heeter, 137 Neb. 905, 291 N. W. 721, 128 A. L. R. 111. There we merely applied the rule of actual possession to the facts. The facts of that case are so dissimilar to the facts here that no comment is required.

It necessarily follows that defendant's attack upon plaintiffs' title by the tax deed has no merit.

We arrive at the same conclusion by another line of reasoning.

It will be noted that section 25-321, R. R. S. 1943, in summary requires an allegation in the petition or other pleading that there are persons who claim to have some interest in the property; that it does not appear of record; that diligent investigation and inquiry have been made; and that the person in whose behalf the investigation has been made does not know the names, whereabouts, or residence of such persons. Section 25-518, R. R. S. 1943, requires an affidavit supporting the allegation. Section 25-517, R. R. S. 1943, requires a court order for service by publication after the court is satisfied that sufficient investigation has been made. It is obvious that such a procedure was intended to establish a "conclusive" record in accord with the facts shown and established to the satisfaction of the court, as against all persons except those "in actual possession" (§ 25-321, R. R. S. 1943), whose interest in the property does not appear of record.

In Draper v. Taylor, 58 Neb. 787, 79 N. W. 709, we stated this rule: Possession of land is notice to the world of the possessor's rights therein.

This holding was followed in Blum v. Voss, 139 Neb. 233, 297 N. W. 84, and Blum v. Poppenhagen, 142 Neb. 5, 5 N. W. 2d 99.

There is a companion rule stated in Talich v. Marvel, 115 Neb. 255, 212 N. W. 540, followed in Marshall v. Rowe, 126 Neb. 817, 254 N. W. 480, and Hollenbeck v. Guardian Nat. Life Ins. Co., 144 Neb. 684, 14 N. W. 2d 330, which is: Where one is put upon inquiry, he is to

be charged with notice of all such facts as he would have learned by reasonable inquiry.

It must be assumed that the Legislature had these rules in mind in making the requirements of allegations, proof by affidavit, and court finding and order.

It is obvious that what the Legislature intended was that a party against whom such service by publication had been had, could, by proof of actual possession at the time involved, disprove the truth of the showing upon which the court had permitted the service by publication to be made. The Legislature limited that right to strict compliance with proof of actual possession in the literal meaning of those words. It did not permit the opening up of the conclusive effect of the service by publication except upon a showing of that condition in fact. The showing here is patently insufficient to meet this test.

Defendant advances a further contention based upon the following from Maryland v. West Virginia, 217 U. S. 1, 30 S. Ct. 268, 54 L. Ed. 645: "Where possession of territory has been undisturbed for many years a prescriptive right arises which is equally binding under the principles of justice on States and individuals."

There again the facts are so dissimilar that we see no reason for discussing the case here.

The judgment of the trial court is affirmed.

AFFIRMED.

MESSMORE, J., participating on briefs.